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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

WALTER J. NALLY and MARIA NALLY,
Petitioners,

v.

GRACE COMMUNITY CHURCH OF THE VALLEY,
a Non-Profit Corporation,
JOHN F. MACARTHUR, JR., L. DUANE REA,
RICHARD A. THOMSON, and LYNN CORY,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of California

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RESPONDENTS' MEMORANDUM IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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The petition for certiorari presents no substantial federal question for review. The unanimous decision of the California Supreme Court, rejecting petitioners' proposed new tort liability theories, is based entirely on state law grounds. Petitioners' assertion that the California Supreme Court's decision *not* to expand that state's tort law somehow violates the establishment clause of the First Amendment, is frivolous on its face.

This litigation arose out of the suicide of Kenneth Nally, age 24, who had been a member of respondent Grace Community Church. Nally had been receiving intermittent spiritual counseling from pastors at Grace Community Church during the weeks and months prior to his suicide. During that time, he had also been seeing a hospital psychiatrist, five different physicians, and two other mental health professionals, because of depression. Following his suicide, Nally's parents brought this action against respondents in the California state courts, asking those courts to adopt new California state tort law causes of action for (i) "clergyman malpractice"; (ii) negligent failure of "nontherapists" (not limited to pastors) to "effectively" refer potentially suicidal persons to psychotherapists; and (iii) "outrageous conduct" in the teaching of certain church doctrines to Nally.[1]

The unanimous decision of the California Supreme Court, below, ruled against petitioners' claims on state tort law and evidentiary grounds, holding that California law does not recognize a cause of action for negligent inaction by pastors or other "nontherapist" counselors in failing to prevent suicide by those whom they counsel. Pet. App. at E19-E20. The court below declined, as a matter of state law, to recognize the new tort law duties proposed by petitioners. *Id.* at E22-E27. Finally, the California Supreme Court held that there was insufficient valid evidence to present a jury issue of intentional infliction of emotional distress through "outrageous conduct", under applicable state tort law. *Id.* at E37-E41.

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[1] Petitioners assert that "Respondents encouraged Kenneth to commit suicide by telling him that suicide was an acceptable alternative for someone unable to live with his sins—someone like Kenneth Nally." Petition for Certiorari at 8. This false and irresponsible charge is contrary to the facts as found by the state courts. Both the trial court and the California Supreme Court found that there was *no* competent evidence in the record that Grace Church pastors made any such statement to Nally at any time. *See* Pet. App. E38-E40.

The court therefore reinstated the trial court's grant of nonsuit on all counts of the complaint. *Id.* at E41. Two justices concurred on the ground that, even were petitioners' proposed new duties to be recognized, respondents' conduct did not constitute a breach of such proposed duties, nor was it in any way a proximate cause of Kenneth Nally's sucide. *Id.* at E41-42.[2]

While respondent Church and its pastors had raised, in the alternative, First Amendment objections to the imposition of liability for conduct engaged in (or not engaged in) as a part of religious counseling, the California Supreme Court held that it did not need to reach these issues:

> Our review of the record reveals the trial court correctly granted a nonsuit as to plaintiffs' causes of action. Neither the evidence adduced at trial nor well-established principles of tort law support the Court of Appeal's reversal of nonsuit in this case. As we explain below, we need not address the constitutional issues posed by defendants.

Pet. App. E18. *See also id.* at E6; *id.* at E33; *id.* at E38 ("[I]t is unnecessary to reach the broader constitutional issues raised by the parties . . .").[3]

Finally, petitioners assert that the decision of the California courts *not* to recognize a new cause of action for

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[2] Petitioners have failed to produce the entirety of the concurring opinion, which, in slip opinion form, is 20 pages long. Petitioners in their appendix have reproduced only the first three paragraphs of that opinion.

[3] The petition for certiorari misrepresents the holding of the court below, suggesting that the court relied on the First Amendment for its decision not to impose a duty of care. Petition for Certiorari at 12. This representation is simply false. The decision of the California Supreme Court is clear in its exclusive reliance on state law grounds for decision. *See generally Michigan* v. *Long*, 463 U.S. 1032, 1038 & n.4 (1983) (collecting cases).

clergyman malpractice or negligence, as a matter of state law, itself violates tht federal Constitution. This assertion is meritless on its face. The establishment clause of the First Amendment surely does not require states to invent new tort law causes of action against pastors. Nor does the decision below accord any form of religious preference. The decision does not purport to carve out an exception for pastors from any preexisting legal duty of general applicability. Rather, the California Supreme Court simply declined to create *any* new tort law duty to control the conduct of another individual, outside of a very limited category of existing physician-patient relationships of custody or control. Pet. App. E21-E27.

CONCLUSION

This case involves nothing but questions of state law. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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